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**STATE OF MINNESOTA
IN COURT OF APPEALS
A07-1779**

Marie Borglum,
Relator,

vs.

Waseca County Board of Commissioners,
Respondent.

**Filed December 9, 2008
Affirmed
Connolly, Judge**

Waseca County Board of Commissioners
File No. Borglum CUP Application

David M. Gross, 6420 French Lake Trail, Faribault, MN 55021 (for relator)

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Considered and decided by Ross, Presiding Judge; Connolly, Judge; and Johnson,
Judge.

UNPUBLISHED OPINION

CONNOLLY, Judge

Relator challenges respondent's decision to deny her application for a conditional-
use permit pertaining to the operation of an armored vehicle recreational facility and

shooting range on her property. Because respondent's decision to deny relator's request for the permit was not arbitrary and capricious, we affirm.

FACTS

On March 1, 2007, relator Marie Borglum submitted an application to respondent Waseca County Board of Commissioners for a conditional-use permit (CUP) to operate an armored vehicle recreational facility.¹ The proposed site for the facility is an area of Waseca County zoned for agricultural use. The proposed site is also the location of an existing concrete recycling business operated by relator and her family. The proposed facility would include an outdoor driving course and an indoor and outdoor shooting range, and be advertised by signs on the property. On March 8, 2007, relator submitted a modified CUP application, which, in addition to activities proposed in the March 1, 2007 application, requested permission to conduct retail sales of guns, souvenirs, promotional items, and other hunting-related products.

CUPs are governed by section 20 of the Waseca County Zoning Ordinance. The zoning ordinance requires the county planning commission to hold at least one public hearing for each CUP application before the board of commissioners may issue a final decision regarding the application.² Section 20, subdivision 5, of the zoning ordinance prohibits the planning commission from recommending a CUP unless it finds the following elements:

¹ The armored vehicles would consist primarily of demilitarized tanks imported from Europe.

² The planning commission included a 2007 county board member, the year in which public hearings on relator's request for a CUP were held.

1. That the Conditional Use will not be injurious to the use and enjoyment of other property in the immediate vicinity for the purposes already permitted, nor substantially diminish and impair property values within the immediate vicinity.
2. That the establishment of the Conditional Use will not impede the normal and orderly development and improvement of surrounding vacant property for predominant uses in the area.
3. That adequate utilities, access roads, drainage and other necessary facilities have been or are being provided.
4. That adequate measures have been or will be taken to provide sufficient off-street parking and loading space to serve the proposed use.
5. That adequate measures have been or will be taken to prevent or control offensive odor, fumes, dust, noise and vibration, so that none of these will constitute a nuisance, and to control lighted signs and other lights in such a manner that no disturbance to neighboring properties will occur.
6. That soil conditions are adequate to accommodate the proposed use.
7. That proper facilities are provided which would eliminate any traffic congestion or traffic hazard which may result from the proposed use.
8. That the density of any proposed residential development is not greater than the density of the surrounding neighborhood, or not greater than the density indicated by the applicable Zoning District.
9. That the intensity of any proposed commercial or industrial development is not greater than the intensity of the surrounding area or not greater than the intensity characteristic of the applicable Zoning District.
10. That the proposed use is compatible with the County Land Use Plan.
11. That there is a demonstrated need for the proposed use.

In addition to these requirements, section 8, subdivision 3, of the zoning ordinance requires that decisions regarding CUPs for land located in agricultural districts, such as the CUP applied for in this case, must address the following considerations:

- a) Development must not interfere with ongoing agricultural practices on adjacent lands.
- b) Development must not alter the overall stability of land use in the area.
- c) Development must be situated on land unsuitable or impractical for the production of farm crops.
- d) Impact on the environmental sensitivity of the area must be considered.
- e) Soil suitability for on-site septic system must be considered.
- f) Only commercial uses clearly related to or compatible with agricultural production should be allowed in the district.
- g) Unsewered industrial, commercial, or residential development within reasonable proximity to municipal sewer and water services shall be discouraged.
- h) Spot commercial development is discouraged.
- i) Proper screening by use of plantings, berms and fencing should be undertaken to minimize adverse impacts on adjacent land uses.

On March 30, 2007, the planning commission was informed in a letter by the Waseca County Soil and Water Conservation District that the site is a wetland subject to the Wetland Conservation Act (WCA). The letter noted that any use that destroys or diminishes the quantity, quality, and biological diversity of the wetland would violate the WCA.

On April 3, 2007, Angela Knish, the county's planning and zoning administrator, submitted a staff report to the planning commission discussing the criteria for granting CUPs as they applied to relator's CUP application. Also on April 3, 2007, relator's CUP application was discussed publicly at a Blooming Grove township meeting. This meeting was attended by a member of the planning commission and a member of the board of commissioners.

The planning commission held its first public hearing on relator's CUP application on April 5, 2007. Relator, her husband, and her son appeared before the planning commission and explained their CUP application. Other members of the public also had the opportunity to address the planning commission regarding relator's CUP application. The public response was overwhelmingly negative. Multiple concerns were raised, including concerns related to the operation of multiple businesses on relator's property, noise, setback requirements, wetlands located on relator's property, lead contamination, health, devaluation of surrounding real estate, lack of demonstrated need for the proposed use, interference with neighbors' enjoyment of their property, and the impact on nearby horses on neighboring lots. After approximately three hours, the hearing ended, and the planning commission voted to table the application until its next meeting so that more information regarding the concerns raised could be gathered and presented.

On May 3, 2007, the planning commission continued its public hearing on relator's CUP application. Members again reviewed the criteria for granting CUPs. The commission heard three hours of public comment on relator's CUP application. Relator's attorney had the chance to address the questions raised at the hearings, and to answer questions posed by members of the planning commission. The planning commission again voted to table a vote on relator's CUP application until its next meeting on June 7, 2007, to enable its members additional time to review the submitted documents and to provide interested parties the opportunity to submit additional materials.³ On May 15,

³ Between its hearings on May 3 and June 7, the planning commission received the following documents: (1) May 10, 2007, five pages of written information from relator,

2007, respondent extended the time limit for action on relator's CUP application by an additional 60 days as a result of the voluminous amount of written material and the complexity of the issues surrounding the application.

On June 7, 2007, the planning commission, for a third time, considered relator's CUP application. This meeting lasted three hours. At this meeting the members of the planning commission discussed the conditions for granting a CUP addressed in section 20, subdivision 5, and section 8, subdivision 3, of the zoning ordinance. As part of this process, the members of the planning commission used a checklist that listed each of the considerations the zoning ordinance required them to consider. Relator was also provided an opportunity to present her arguments in favor of granting the CUP.

The planning commission ultimately voted to deny relator's CUP application for the following reasons: (1) the proposed track for the armored vehicles did not meet the 1,500-foot setback required by section 20, subdivision 6, of the zoning ordinance; (2) contrary to best practices, there was not a half-mile minimum distance between the outdoor shooting range and neighboring residences; (3) a sound study demonstrated a

including drawings of typical side berms and a typical shooting range; (2) May 18, 2007, Ms. Knish sent the county board minutes of the April 5 meeting, a draft of minutes from the May 3 meeting, a draft of the staff report for the June 7 meeting, and input from citizens regarding relator's CUP application; (3) May 24, 2007, relator submitted an 18-page critique of a noise study conducted regarding the CUP application. The planning commission accepted this material despite having set a May 10 deadline for written submissions. Ms. Knish provided respondent with a memo regarding relator's CUP request, a worksheet of the criteria for granting a CUP, and a worksheet for making their findings. These worksheets contained all of the criteria for CUPs generally as well as the specific criteria for CUPs located in agricultural districts. Finally on June 6, 2007, relator submitted a letter addressing concerns about the proposed use that were raised in the staff report to the planning commission prepared for the June 7 meeting.

significant concern with noise; (4) there were safety issues; (5) evidence demonstrated that the proposed use would lower real estate values in the immediate vicinity; (6) the CUP application did not include noise-mitigation measures; and (7) the inability to safely run relator's current business as well as the proposed use.

On June 18, 2007, Ms. Knish emailed respondent a draft of proposed findings. At respondent's June 19, 2007 meeting, Ms. Knish requested that a vote on the issue be delayed two weeks to enable relator sufficient time to present its case to respondent. She reported to respondent that the planning commission voted to recommend denial of the CUP application for the seven reasons stated above. Respondent postponed the matter until July 3, 2007, so that the written report of the findings of fact could be completed.

On June 29, 2007, each member of the board of commissioners received copies of the material contained in the file for relator's CUP application. On July 2, 2007, relator submitted a letter to respondent stating why it should grant her CUP application. Respondent considered relator's CUP application on July 3, 2007. It voted to deny relator's CUP application and directed the county attorney to prepare written findings for final approval and signature at respondent's July 17, 2007 meeting. On July 17, 2007, the denial of relator's CUP application was included in the consent agenda. Respondent voted to approve the consent agenda thereby approving the final version of the findings that supported denying relator's CUP application. No more public hearings regarding relator's CUP application were held.

Relator argues that respondent's decision to deny her CUP application was arbitrary and capricious. This appeal follows on a writ of certiorari.

DECISION

Counties in Minnesota are authorized to carry on county planning and zoning activities which promote the “health, safety, morals, and general welfare of the community.” Minn. Stat. § 394.21 (2006). County board decisions regarding CUPs are quasi-judicial and reviewable by a writ of certiorari. *Interstate Power Co., Inc. v. Nobles County Bd. of Comm’rs*, 617 N.W.2d 566, 574 (Minn. 2000). Appellate courts review a county’s decision to approve or deny a CUP independently to see whether there was a “reasonable basis for the decision, or whether the county acted unreasonably, arbitrarily, or capriciously.” *Schwardt v. County of Watonwan*, 656 N.W.2d 383, 386 (Minn. 2003). The decision to deny a CUP is unreasonable when the “applicant establishes that all of the standards specified by the zoning ordinance as conditions of granting the permit have been met.” *Yang v. County of Carver*, 660 N.W.2d 828, 832 (Minn. App. 2003).

An applicant whose CUP has been denied bears the burden of persuading this court “that the reasons for the denial either are legally insufficient or had no factual basis in the record.” *Id.* This court defers to a county’s decision to deny a CUP when the factual basis for the denial has even the “slightest validity.” *Roselawn Cemetery v. City of Roseville*, 689 N.W.2d 254, 259 (Minn. App. 2004) (quoting *White Bear Docking & Storage, Inc. v. City of White Bear Lake*, 324 N.W.2d 174, 176 (Minn. 1982)).

Relator first contends that respondent’s decision to deny her CUP was arbitrary and capricious because it “did not review the evidence and issues, did not deliberate at all, and did not reduce its reasons to writing.” “While it is not necessary to prepare formal findings of fact, a county board must, at a minimum, have the reasons for its

decision recorded or reduced to writing and in more than just a conclusory fashion.” *Picha v. County of McLeod*, 634 N.W.2d 739, 742 (Minn. App. 2001) (quotation omitted).

Relator’s contention is unavailing. Respondent appointed a planning commission and charged it with the authority to review all applications for CUPs. As part of the review process, respondent required the planning commission to hold at least one public hearing on each CUP application. Minn. Stat. § 394.30, subds. 1, 5 (2006) (granting county boards the authority to appoint a planning commission and require it to hold public hearings).

The planning commission held three public hearings to discuss relator’s CUP application. Its recommendation was made to respondent through proposed findings of fact, conclusions, and order. Respondent received the planning commission’s recommendation on June 18, 2007, and considered it for approximately one month until it was finally adopted on July 17, 2007. On April 27, 2007, respondent also received a substantial amount of written material from Ms. Knish regarding relator’s CUP application. Relator had the opportunity to appear in front of the planning commission three times. She also had numerous opportunities to present written material in support of her application. When respondent did deny relator’s CUP application, it adopted contemporaneous findings that were based on the substantial record in this case. It then issued a 12-page written order which included 28 findings of fact. This procedure establishes that, prior to making its final decision, respondent undertook an extensive review of relator’s application. This review included three public meetings by the

planning commission and two by the county board. All of respondent's members attended at least one of the planning commission's meetings. During the course of the review, relator had numerous opportunities, which she made use of, to submit written material in support of her application. She also had the opportunity to address both the planning commission and respondent prior to respondent's final decision. Respondent's written findings and our review of the record indicates that it dutifully considered the material presented to it prior to denying relator's CUP application. In other words, we do not agree with relator's contention that respondent's decision was arbitrary and capricious because it "did not review the evidence and issues, did not deliberate at all, and did not reduce its reasons to writing."

Relator next argues that respondent's decision was arbitrary and capricious because it lacked a legally sufficient basis. This argument is also unavailing. Respondent's order concluded that numerous municipal zoning ordinances were not satisfied by relator's CUP application. This is a valid reason for denying her application. *Yang*, 660 N.W.2d at 832. Again, a review of the record indicates that this conclusion possessed the necessary factual basis. Respondent listed several reasons to deny the CUP. Our discussion below is limited to an analysis of whether respondent's determination that the zoning ordinance's requirements relating to property values and setbacks was either arbitrary or capricious.

Section 20, subdivision 5, of the zoning ordinance requires a CUP applicant to show that the conditional use will not "substantially diminish and impair property values within the immediate vicinity." Respondent found that relator did not make this showing.

Respondent had access to two opinions by realtors opining that neighboring property values would be significantly affected in a negative fashion by the proposed use. Patti Schuch is a certified residential specialist, a certified buyer's agent, a broker associate, and a graduate of the realtor's institute. She has 14 years of experience selling real estate. She stated the proposed use would have a significantly negative effect on a neighboring property because with "such a close proximity to the high powered pistols, long range rifles and assault caliber machine guns, the fear factor alone to potential buyers would more than likely be insurmountable." She also stated that the noise from the proposed use would affect an owner's quiet enjoyment of their home and that this material fact would have to be disclosed to a potential buyer because it could adversely affect the use of the home. Dave Fandel, a real-estate broker, opined that the proposed use would negatively affect the price of property within the immediate vicinity. He also stated that the proposed use would need to be pointed out to all prospective buyers.

While relator may disagree with the aforementioned opinions, she provided no evidence to rebut the realtors' opinions, and it was within respondent's discretion to give greater weight to the opinions of experienced realtors than to the unsupported arguments made by relator. *See Schwardt*, 656 N.W.2d at 388 (stating that "county board[s] may discount evidence that lacks relevance or credibility").

Section 20, subdivision 6, of the zoning ordinance states that "[n]o motor vehicle track including auto, snowmobile, motorcycle, go-cart, or minibike shall be allowed within fifteen hundred (1,500) feet of any residential structure." The zoning ordinance provides that "[a]ny word or term which appears in this Ordinance that is not defined

herein shall be interpreted and defined by the Zoning Administrator.” “Motor vehicle track” is left undefined by the zoning ordinances. It is undisputed by the parties that the demilitarized tanks are “motor vehicles” within the meaning of the ordinance. In providing guidance to the planning commission on the definition of “track,” Ms. Knish looked to dictionaries in order to discern the term’s plain meaning. The dictionary definitions included “a course or route followed,” “a path or course laid out for some particular purpose,” and “a course or route followed; line of travel.” In her April 27, 2007 report to the planning commission, Ms. Knish determined that relator’s proposed use was a motorized vehicle track. The planning commission agreed that the proposed tank course was a motor vehicle track during its June 7, 2007 meeting. The planning commission’s report to respondent established that the zoning ordinance’s setback requirement was not met. Respondent approved and adopted the planning commission’s oral finding that the proposed tank course did not meet the 1,500-foot setback requirement in its findings of fact.

Relator takes issues with respondent’s definition of “motor vehicle track.” Specifically, relator argues that “track” as used in “motor vehicle track” refers to “racetracks.” This argument is without merit. “Motor vehicle track,” on its face, is not limited to “motor vehicle racetracks.” While there are references to racing and racetracks in other sections of the zoning ordinance, none of these references are used to qualify or restrict “motor vehicle track” as it is used in section 20, subdivision 6(2). If anything, the use of the term “racetracks” in other portions of the zoning ordinances cuts against relator’s claim that “motor vehicle track” should be read as “motor vehicle racetrack”

because it establishes that the zoning ordinance’s drafters could distinguish between “tracks” and “racetracks.”

In conclusion, respondent did not act in an arbitrary and capricious manner in denying the CUP, and its decision is substantially supported by the evidence.

Relator’s request to strike certain documents contained in the record, which was raised for the first time in her reply brief, is denied.

Affirmed.